No. 92-1213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

VIRGINIA MILITARY INSTITUTE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' REPLY BRIEF

RICHARD K. WILLARD
Counsel of Record
DAVID A. PRICE
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

GRIFFIN B. BELL
WILLIAM A. CLINEBURG, JR.
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303

ROBERT H. PATTERSON, JR.
WILLIAM G. BROADDUS
ANNE MARIE WHITTEMORE
FRANK B. ATKINSON
McGUIRE, WOODS, BATTLE & BOOTHE
One James Center
Richmond, Virginia 23219
Counsel for Virginia Military Institute, its Board of Visitors and Superintendent, VMI Foundation, Inc., and VMI Alumni Association

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Nothing could be clearer from the Government's brief in opposition ("Opp. Br.") than its objective of eliminating all remaining single-sex educational institutions and insuring that coeducation is regarded as a constitutional imperative. In its zeal to pursue this objective, the Government is willing to embrace a court of appeals decision whose rationale is artificial and unreasonable, while reserving the right to argue against that very rationale if the Court grants certiorari.

It is disheartening that the Government would seek to impose coeducational conformity on American public education at a time when the urgency of reform is almost universally recognized, and when a growing body of evidence confirms the value of single-sex education for adolescents. If the Court fails to grant certiorari in this case, the practical considerations confronting state and local governments may result in the elimination of public single-sex education as an option without the Court ever having another opportunity to consider the issue.

I. CONTRARY TO THE GOVERNMENT'S CLAIM, THE DECISION BELOW IS NOT "A STRAIGHTFORWARD, FACT-BOUND APPLICATION" OF *HOGAN*

The Government's brief in opposition contends that review of the decision below is unwarranted because the decision is "a straightforward, fact-bound application" of *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). Opp. Br. at 9; *see also id.* at 19. That characterization is wrong. The decision below refers to *Hogan* just once in support of its reasoning, and then only in connection with a generic description of the intermediate scrutiny test. Pet. App. 12a. Instead, the result below was based on the panel's view that the Equal Protection Clause imposes an *additional* requirement for public single-sex education which was no part of the analysis of the Court in *Hogan*—*i.e.*, that the state must also operate an identical institution for members of the other sex. Whether the Equal Protection Clause imposes this additional requirement is the issue that the Fourth Circuit's decision presents for resolution in this Court.

Indeed, the "fact-bound" portion of the Fourth Circuit's decision was the portion in which it *accepted* the district court's conclusion that VMI's admissions policy is justified under the analysis applied in *Hogan*. The court of appeals upheld the district court's factual findings as to the benefits of single-sex education generally and at VMI and agreed that the "changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology." Pet. App. 14a. Moreover, contrary to the Government's assertion (*see* Opp. Br. at 10-11), the district court specifically found, and the appellate court agreed, that the continuation of VMI's single-sex policy was the result of "reasoned analysis" rather than stereotypes. Pet. App. 14a, 15a, 36a-37a, 74a.

Although it accepted the district court's *Hogan* analysis, the court of appeals held the continuation of VMI's single-sex program to be illegal because the Commonwealth of Virginia did not provide a VMI-type program for women. Pet. App. 21a. It is important to recognize that, although the Government attempts to defend the Fourth Circuit's ruling,[1] it does not actually agree with that court's rationale. Thus, the Government purports to "reserve the argument" that the Equal Protection Clause also forbids the establishment of an identical

[1] The Government, unlike the court of appeals, attempts to ground the "parallel program" requirement in the text of *Hogan*, relying on footnote 17. Opp. Br. at 11-12, 13 n.3. But footnote 17 simply does not address the permissibility or necessity of separate-but-equal single-sex programs, an issue that the Court had expressly distinguished earlier in its opinion. *See* 458 U.S. at 720 n.1. Footnote 17 merely rejects the idea that a single-sex program is justified whenever it provides an additional option to those who are permitted to attend, a justification that would be true in every case. Instead, the Court indicates that the provision of such an option to the benefited class must be justified by a showing that it is "substantially related to achieving a legitimate and substantial goal." *Id.* at 731 n.17. Both the district court and court of appeals found that the benefits of VMI's adversative program, which require a single-sex environment, meet this standard.

VMI-type school for women. Opp. Br. at 16 n.5. The basis for this argument, as intimated by the Government, is that "'separate but equal' schools for men and women" are unconstitutional. *Id.*[2] The Government attempts to have it both ways, defending as a "straightforward application" of *Hogan* the Fourth Circuit's reasoning that identical programs are *required*, while simultaneously indicating that such programs are *forbidden*.

The Government's suggestion that parallel single-sex schools may be unconstitutional completely undermines its professed reason for opposing certiorari in this case. The failure to operate a corresponding VMI-type program for women in Virginia can hardly constitute a constitutional violation if the operation of separate VMI-type institutions for males and females would itself violate the Constitution. Moreover, the Government's suggestion that the validity of parallel single-sex programs is not presented at this juncture because of the availability of remedial alternatives on remand cannot withstand examination. Opp. Br. at 16-17 n.5. The question whether separate-but-equal single-sex schools are permissible under the Constitution—and, if permissible, whether they are required—is ripe for review because it arises from the Fourth Circuit's decision predicating *liability* on the absence of a VMI-type program for women in Virginia. The existence of remedial alternatives does not, and the Commonwealth's election of a remedy will not, affect resolution of this issue.[3]

[2] The Government's view coincides with that expressed by an academic critic of both VMI's position and the Fourth Circuit's decision: "The court approved a separate but equal solution that may have been good statesmanship but which rested on weak and faulty equal protection analysis." Mary M. Cheh, *An Essay on VMI and Military Service: Yes, We Do Have To Be Equal Together*, 50 Wash. & Lee L. Rev. 49, 49 (1993). The difference is that Professor Cheh, unlike the Government, acknowledges the artificial, result-oriented nature of the Fourth Circuit's reasoning. *See id.* at 55.

[3] The remedial choice afforded the Commonwealth by the Fourth Circuit is but a reflection of the well-established rule that equal

II. THE DECISION BELOW CREATES AN ARTIFICIAL AND UNREASONABLE BARRIER TO THE OPERATION OF SINGLE-SEX PROGRAMS

Both the Fourth Circuit's opinion and the Government's brief speak in terms of Virginia's failure to "justify" the absence in Virginia of a VMI-type program for women. Pet. App. 5a, 17a-21a; Opp. Br. at 8, 12. This search for some further justification is more ostensible than real, however. It is clear that no justification could be proffered to satisfy the court of appeals' rigid and impractical test.

As explained in our petition, the absence of a women's VMI is amply justified by lack of demand and by the lack of benefit to women students. *See* Pet. at 12-13. Neither the decision below nor the Government's brief takes issue with the evidentiary support for the factual findings of the district court concerning gender-based developmental differences, which make VMI's adversative program primarily suitable for adolescent males and not females. *See* Pet. App. 82a-83a.[4] Indeed, no all-women's military-style college has ever been established in the

protection violations may be remedied "by withdrawal of benefits from the favored class [or] by extension of benefits to the excluded class." *Heckler v. Matthews*, 465 U.S. 728, 740 (1984).

[4] The existence of significant and material gender-based developmental differences was not questioned by any of the four education experts who testified below. Indeed, the Government's expert on higher education stated that "there clearly are differnces between men and women, and not only obvious physiological ones, but ones having to do in part with how they interact, how they learn, and so on." Tr. 377; App. 625.

The district court emphasized that the expert testimony regarding gender-based developmental differences (and their implications for the VMI program) was corroborated by the extensive proof of West Point's experience with coeducation. Pet. App. 36a. The U.S. Military Academy modified and ultimately abandoned the adversative model following the admission of female cadets. Pet. App. 96a, 98a. Moreover, the Government's West Point witness confirmed that there are "distinctive psychological and sociological needs of women" which are "real differences, not stereotypes." Pet. App. 83a.

United States.[5] If Virginia were to decide to operate a public women's college, it is hard to believe that the Constitution would require it to model its program after VMI. Yet, that is the burden of the Fourth Circuit's analysis.

The Government, in seeking to find support for the court of appeals' rationale, points to the district court's findings that "some women would benefit from a VMI-type education," Opp. Br. at 14 (citing Pet. App. 82a), and that "some women are capable of all of the individual actions required of VMI cadets," Opp. Br. at 14 (quoting Pet. App. 34a). But the district court's findings also make clear that college-age women who fall into these categories are rare. Pet. App. 82a.[6] While *strict* scrutiny would require the virtually perfect means-end fit upon which the Government insists here, the empirically shown correlation between gender and the benefit of VMI's adversative method (*see* Pet. App. 36a, 82a-83a) easily suffices to establish the "substantial relationship" demanded by intermediate scrutiny. *See Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981).

[5] As one commentator has noted, "One would not be surprised to learn that there are no private VMI-style schools for women; the nonexistence of a market for such schools ought to tell us something about the reasonableness of VMI's admissions policy; it also suggests something about the purely symbolic nature of this lawsuit." Allan Ides, *The Curious Case of the Virginia Military Institute: An Essay on the Judicial Function*, 50 Wash. & Lee L. Rev. 35, 45-46 (1993).

[6] The record also contains no evidence that there is any demand for an all-women's military college. The Government cites the finding that "some women, at least, would want to attend" VMI, Opp. Br. at 14 (quoting Pet. App. 38a), and refers to the fact that 347 women made inquiries to VMI over a two-year period, Opp. Br. at 2. This finding and evidence refer to demand for attending a *coeducational* VMI; they provide no support for the notion that there would be any demand for an all-women's school offering a VMI-type program. Even the demand for coeducational residential military programs is quite limited, with a total of fewer than 250 women participating nationwide. *See* Pet. 13 n.11.

The Government's position, like that of the court below, amounts to a *per se* requirement that a public single-sex program for one gender must always be accompanied by an identical program for the other gender, with the state having no discretion to weigh the benefits of or demand for the parallel program.[7] The Government thus would compel the very sort of "gestures of superficial equality" that this Court has counseled against. *Rostker*, 453 U.S. at 79.

As indicated in the petition, VMI does not doubt that the Equal Protection Clause would forbid a state from operating its system of higher education in such a way that it did not offer both sexes generally comparable opportunities. *See* Pet. at 14. The Government erroneously asserts that this view supports the decision below. Opp. Br. at 16. In VMI's view, within the context of a system that provides generally comparable opportunities to men and women, a state is free under *Hogan* to provide certain opportunities only to one sex where, as here, the decision satisfies intermediate scrutiny.[8] It is this critical proposition that the Fourth Circuit and the Government reject.

III. THE EQUAL PROTECTION CLAUSE DOES NOT FORBID A STATE FROM DELEGATING EDUCATIONAL POLICY TO DECENTRALIZED INSTITUTIONAL BOARDS

The Government also embraces the Fourth Circuit's theory that VMI's single-sex program is invalid based on the " 'lack of a state-announced policy to justify gender

[7] Thus, for example, the Government cites with approval a district court decision holding that a high school must either operate a girls' football team or permit girls to participate in the boys' football team. *See* Opp. Br. at 18 n.6 (citing *Force by Force v. Pierce City R-VI School Dist.*, 570 F. Supp. 1020 (W.D. Mo. 1983)).

[8] There is no contention in this case that Virginia's support for higher education discriminates against women overall. On the contrary, there are nearly 13,000 more women than men in Virginia's public institutions of higher education—a differential roughly ten times the size of VMI's student body. *See* Pet. at 14 & n.12.

classifications.' " Opp. Br. at 9 (quoting Pet. App. 19a). *See also id.* at 19. This, too, is a contrived rationale without foundation in this Court's jurisprudence.

Virginia law delegates the oversight of VMI to a Board of Visitors subject to control by the General Assembly. *See* Va. Code § 23-104, Pet. App. 105a. The district court found that the boards of visitors of Virginia's public colleges and universities have "broad autonomy in the . . . composition of [the school's] student body." Pet. App. 49a-50a. "Whether a university should be coeducational or single-sex is in every case decided by the Board of Visitors of the institution." *Id.* at 50a. Nonetheless, for some unexplained reason, the Government does not consider an articulation of state policy by the boards of visitors of Virginia's colleges and universities to count for purposes of equal protection review. Hence, the Government does not mention either the 1986 decision of the VMI Board of Visitors to retain the all-male admission policy following an extensive mission study or the district court's conclusion that the mission study represents a reasoned analysis. *See* Pet. at 5-6; Pet. App. 37a, 68a-74a.

As this Court has recognized, "it is self-evident that official policies can only be adopted by those legally charged with doing so." *St. Louis v. Praprotnik*, 485 U.S. 112, 125 n.2 (1985). The Government evades this proposition by focusing on a series of statements by officials or institutions having no power to set higher education policy, a function delegated by the General Assembly to the various boards of visitors. *See* Opp. Br. at 3, 10.[9] Under Virginia law, as the district court

[9] Contrary to the statements by Virginia's attorney general on which the Government relies, the Virginia governor's expression of his "personal philosophy" opposed to public single-sex education has no relevance whatsoever with respect to the higher education policy of the Commonwealth. Indeed, the governor himself advised the district court that the Virginia General Assembly, not the governor, is responsible for setting state policy applicable to college admissions. *See* Memorandum in Support of Motion of Defendant

noted, the VMI Board is the agency of the Commonwealth empowered to establish VMI's admissions policy, and it has done so with a clear articulation of purpose. Moreover, the General Assembly has continually authorized the expenditure of state funds to support VMI's program.

IV. THE GOVERNMENT'S BRIEF CONFIRMS THAT THE EFFECTS OF THE DECISION BELOW ARE FAR-REACHING

As noted in the petition for certiorari, the decision below has disturbing implications for public and private single-sex schools at the college level and lower levels, and for the prospects of educational innovation. The Government's efforts to minimize the effects of the decision below are unpersuasive.

Significantly, the Government does not take issue with VMI's observations as to the potential effect of the decision on private colleges and universities. *See* Pet. at 22-23. The two *amici curiae* briefs submitted by private women's colleges in this case indicate the legitimate concern of private schools as to the potential effect of the decision below.[10] Governmental tuition subsidies and student loan programs, federal research grants, preferential

Lawrence Douglas Wilder to Dismiss, at 5-6; Memorandum in Support of Governor Wilder's Motion in Limine at 4 ("Whether there is a 'state interest' in VMI's admission policy is determined not by Governor Wilder's opinion, but by the General Assembly.").

The Government also cites an isolated phrase in a report of the Commission on the University in the 21st Century referring to the need for schools to "deal with faculty, staff, and students without regard to sex, race, or ethnic origin." *Id.* at 10. Nothing in the quoted report suggests that VMI's single-sex student body is inconsistent with state policy, and indeed, the report refers approvingly to the fact that the system of higher education in Virginia includes a single-sex institution. *See* Pet. App. 50a.

[10] *See* Brief *Amici Curiae* of Mary Baldwin College, Saint Mary's College, and Southern Virginia College for Women (hereinafter "Three Women's Colleges Brief"); Brief *Amici Curiae* of Wells College, Randolph-Macon Woman's College, Sweet Briar College, and Hollins College.

treatment under federal and state tax laws, and ROTC programs are a few of the ways in which private single-sex schools are entangled with the public sector. *See* Three Women's Colleges Brief, *supra*, at 17-19. These entanglements may lead courts to apply the Equal Protection Clause to exclude single-sex schools from such government programs, a likelihood that the Government does not deny or even minimize.

With regard to the effect of the Fourth Circuit's decision upon single-sex primary and secondary schools, such as those considered for young men in Detroit and other urban centers, the Government's entire response is as follows: "[T]his case involves college students, not high school students. Cf. *United States v. Fordice*, 112 S. Ct. 2727, 2736 (1992) ('[A] state university system is quite different in very relevant respects from primary and secondary schools.')." Opp. Br. at 18. The Government does not indicate how primary and secondary schools are different from colleges in this context, and certainly the Government provides no indication that it would support the application of a lesser level of scrutiny to single-sex programs at the primary and secondary level.[11]

The Government asserts that the legality of public all-women's colleges "is not likely to be resolved by further review in the instant case" because the analysis of the admissions policies at those schools would involve the issue of whether the policies served the purpose of

[11] The effect of equal protection doctrine on experimentation at the primary and secondary level has real consequences. In 1991, as described in the brief *amicus curiae* of Women's Washington Issues Network, Women for VMI, Frank F. Hayden, and Oscar W. King, III, the efforts of *amicus* Frank F. Hayden, and other members of the Detroit Board of Education to establish three public all-male academies—a response to "the academic and social problems of young men, who had a dropout rate of 54%, a suspension rate of over 66%, and consistently scored lower on standardized reading and math tests and had greater disciplinary problems than young women"—was thwarted by an equal protection challenge similar to the one brought against VMI. *Id.* at 17-18. *See also* Pet. at 20.

compensating for past discrimination. This Court's decision in *Hogan*, however, indicates that public women's colleges will face substantial difficulties in justifying their admissions policies based upon a remedial rationale. Of course, the compensatory rationale provides no protection for an institution that bases its single-sex policy on pedagogical rather than compensatory factors.[12]

In sum, the Government's brief serves to confirm that "it is easy to go too far with rigid rules in this area of claimed sex discrimination," and in the process "relegate ourselves to needless conformity." *Hogan*, 458 U.S. at 734-35 (Blackmun, J., dissenting).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

---

[12] The Government's attempt to distinguish the conflicting decisions of the Sixth Circuit, the Ninth Circuit, and the Minnesota Supreme Court are no more availing. *See* Pet. 16-17. The Government seeks to distinguish *Cape v. Tennessee Secondary School Athletic Ass'n*, 563 F.2d 793 (6th Cir. 1977); *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); and *Striebel v. Minnesota State High School League*, 321 N.W.2d 400 (Minn. 1982) based on the observation that those cases involved high schools rather than colleges. *See* Opp. Br. at 17-18. The Government's observation is accurate, but of no apparent relevance.

In addition, the Government seeks to distinguish *Clark*, which involved the exclusion of boys from an all-girl's volleyball team, based on the compensatory purpose of the team. That, too, is no distinction. In both this case and in *Clark*, the district court found an important governmental objective served by the single-sex program—here, the benefits provided by VMI's adversative program, and in *Clark*, the equalization of athletic opportunities. Both courts also found a substantial relationship between the classification and the objective. Where the Fourth Circuit parted company with the Ninth Circuit was in further requiring that VMI justify the absence of a parallel single-sex program for women, a possibility that the Ninth Circuit addressed and specifically refused to require. *See Clark*, 695 F.2d at 1131.

Respectfully submitted,

RICHARD K. WILLARD
Counsel of Record
DAVID A. PRICE
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

GRIFFIN B. BELL
WILLIAM A. CLINEBURG, JR.
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303

ROBERT H. PATTERSON, JR.
WILLIAM G. BROADDUS
ANNE MARIE WHITTEMORE
FRANK B. ATKINSON
McGUIRE, WOODS, BATTLE & BOOTHE
One James Center
Richmond, Virginia 23219

Counsel for Virginia Military Institute, its Board of Visitors and Superintendent, VMI Foundation, Inc., and VMI Alumni Association